

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JERRY A. DYKEMAN,	)	
	)	No. CV-08-00132-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 14, 2008. (Ct. Rec. 13, 16). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Stephanie Martz represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) On November 12, 2008, Plaintiff filed a reply. (Ct. Rec. 18.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13.)

**JURISDICTION**

Plaintiff filed applications for SSI benefits and DIB on August 25, 2004 (Tr. 72-74, 334-336), alleging onset as of November 1, 2002. (Tr. 358.) The applications were denied

1 initially and on reconsideration. (Tr. 47-50, 53-60.)  
2 Administrative Law Judge (ALJ) Richard A. Say held a hearing on  
3 September 6, 2006. (Tr. 355-373.) Plaintiff, represented by  
4 counsel, and vocational expert Tom Moreland testified. On  
5 November 8, 2006, the ALJ issued a decision finding that plaintiff  
6 was not disabled. (Tr. 21-28.) The Appeals Council denied a  
7 request for review on March 8, 2008. (Tr. 7-10.) Therefore, the  
8 ALJ's decision became the final decision of the Commissioner,  
9 which is appealable to the district court pursuant to 42 U.S.C. §  
10 405(g). Plaintiff filed this action for judicial review pursuant  
11 to 42 U.S.C. § 405(g) on April 25, 2008. (Ct. Rec. 1,4.)

#### 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcript, the ALJ's decision, the briefs of both Plaintiff and  
15 the Commissioner, and will only be summarized here.

16 Plaintiff was 53 years old on the date of the hearing. (Tr.  
17 356.) He has a high school education and completed building  
18 trades training in 1987. (Tr. 120.) Plaintiff has past work as  
19 glazing windows, repairing appliances and pallets, building  
20 trailers, and as a maintenance worker. (Tr. 94, 103, 198, 367-  
21 368.) He alleges disability as of November 1, 2002, due  
22 obstructive pulmonary disease (COPD) and neck and back problems.  
23 (Tr. 189-190, 207.)

#### 24 **SEQUENTIAL EVALUATION PROCESS**

25 The Social Security Act (the "Act") defines "disability"  
26 as the "inability to engage in any substantial gainful activity by  
27 reason of any medically determinable physical or mental impairment  
28

1 which can be expected to result in death or which has lasted or  
2 can be expected to last for a continuous period of not less than  
3 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
4 Act also provides that a Plaintiff shall be determined to be under  
5 a disability only if any impairments are of such severity that a  
6 plaintiff is not only unable to do previous work but cannot,  
7 considering plaintiff's age, education and work experiences,  
8 engage in any other substantial gainful work which exists in the  
9 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
10 Thus, the definition of disability consists of both medical and  
11 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
12 (9<sup>th</sup> Cir. 2001).

13 The Commissioner has established a five-step sequential  
14 evaluation process for determining whether a person is disabled.  
15 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
16 is engaged in substantial gainful activities. If so, benefits are  
17 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
18 not, the decision maker proceeds to step two, which determines  
19 whether plaintiff has a medically severe impairment or combination  
20 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
21 416.920(a)(4)(ii).

22 If plaintiff does not have a severe impairment or combination  
23 of impairments, the disability claim is denied. If the impairment  
24 is severe, the evaluation proceeds to the third step, which  
25 compares plaintiff's impairment with a number of listed  
26 impairments acknowledged by the Commissioner to be so severe as to  
27 preclude substantial gainful activity. 20 C.F.R. §§  
28

1 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
2 App. 1. If the impairment meets or equals one of the listed  
3 impairments, plaintiff is conclusively presumed to be disabled.  
4 If the impairment is not one conclusively presumed to be  
5 disabling, the evaluation proceeds to the fourth step, which  
6 determines whether the impairment prevents plaintiff from  
7 performing work which was performed in the past. If a plaintiff  
8 is able to perform previous work, that Plaintiff is deemed not  
9 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
10 At this step, plaintiff's residual functional capacity ("RFC")  
11 assessment is considered. If plaintiff cannot perform this work,  
12 the fifth and final step in the process determines whether  
13 plaintiff is able to perform other work in the national economy in  
14 view of plaintiff's residual functional capacity, age, education  
15 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
16 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

17 The initial burden of proof rests upon plaintiff to establish  
18 a *prima facie* case of entitlement to disability benefits.  
19 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
20 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
21 met once plaintiff establishes that a physical or mental  
22 impairment prevents the performance of previous work. The burden  
23 then shifts, at step five, to the Commissioner to show that (1)  
24 plaintiff can perform other substantial gainful activity and (2) a  
25 "significant number of jobs exist in the national economy" which  
26 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
27 Cir. 1984).

**STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court  
2 may not substitute its judgment for that of the Commissioner.  
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
4 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
5 substantial evidence will still be set aside if the proper legal  
6 standards were not applied in weighing the evidence and making the  
7 decision. *Browner v. Secretary of Health and Human Services*, 839  
8 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
9 evidence to support the administrative findings, or if there is  
10 conflicting evidence that will support a finding of either  
11 disability or nondisability, the finding of the Commissioner is  
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
13 1987).

#### 14 **ALJ'S FINDINGS**

15 At the outset, the ALJ found plaintiff met the DIB  
16 requirements through December 31, 2005. (Tr. 21.) The ALJ found at  
17 step one that plaintiff has not engaged in substantial gainful  
18 activity since onset. (Tr. 23.) At steps two and three, the ALJ  
19 found that plaintiff suffers from degenerative disk disease and  
20 COPD, impairments that are severe but which do not alone or  
21 combination meet or medically equal a Listing impairment. (Tr.  
22 23-24.) The ALJ found plaintiff less than completely credible.  
23 (Tr. 25-26.) At step four, relying on the VE, the ALJ found  
24 plaintiff's RFC for a wide range of light work prevents him from  
25 performing his past relevant work. (Tr. 24, 27, 368-369.) At step  
26 five, again relying on the vocational expert, the ALJ found there  
27 are other light unskilled jobs plaintiff could perform, including  
28

1 assembler, cashier and cleaner/housekeeper. (Tr. 28, 370.)  
2 Accordingly, the ALJ found that plaintiff is not disabled as  
3 defined by the Social Security Act.

#### 4 **ISSUES**

5 Plaintiff contends that the Commissioner erred as a matter of  
6 law by failing to properly weigh the medical evidence, including  
7 the opinion of his treating pulmonologist, Todd Green, M.D. (Ct.  
8 Rec. 14 at 10-13.) The Commissioner responds that the ALJ  
9 appropriately weighed the medical evidence and asks the Court to  
10 affirm the decision. (Ct. Rec. 17 at 11-12).

#### 11 **DISCUSSION**

##### 12 **Weighing medical evidence**

13 In social security proceedings, the claimant must prove the  
14 existence of a physical or mental impairment by providing medical  
15 evidence consisting of signs, symptoms, and laboratory findings;  
16 the claimant's own statement of symptoms alone will not suffice.  
17 20 C.F.R. § 416.908. The effects of all symptoms must be  
18 evaluated on the basis of a medically determinable impairment  
19 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
20 416.929. Once medical evidence of an underlying impairment has  
21 been shown, medical findings are not required to support the  
22 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
23 341, 345 (9<sup>th</sup> Cr. 1991).

24 A treating physician's opinion is given special weight  
25 because of familiarity with the claimant and the claimant's  
26 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
27 Cir. 1989). However, the treating physician's opinion is not  
28

1 "necessarily conclusive as to either a physical condition or the  
2 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
3 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
4 a treating physician than an examining physician. *Lester v.*  
5 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
6 weight is given to the opinions of treating and examining  
7 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
8 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
9 physician's opinions are not contradicted, they can be rejected  
10 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
11 If contradicted, the ALJ may reject an opinion if he states  
12 specific, legitimate reasons that are supported by substantial  
13 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
14 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

15 In addition to the testimony of a nonexamining medical  
16 advisor, the ALJ must have other evidence to support a decision to  
17 reject the opinion of a treating physician, such as laboratory  
18 test results, contrary reports from examining physicians, and  
19 testimony from the claimant that was inconsistent with the  
20 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
21 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
22 Cir. 1995).

23 Plaintiff contends that the ALJ failed to properly credit  
24 the opinion of treating physician Dr. Green that plaintiff is  
25 limited to sedentary, rather than light, work. (Ct. Rec. 14 at  
26 12-13.)

27 The ALJ gave little weight to Dr. Green's RFC for sedentary  
28



1 work because: (1) Dr. Green performed a one-time examination; (2)  
2 he did not have the benefit of reviewing plaintiff's longitudinal  
3 records; and (3) his opinion is inconsistent with objective  
4 medical evidence. (Tr. 26.)

5 Dr. Green examined plaintiff on February 21, 2006. (Tr. 304-  
6 305.) He diagnosed a pulmonary nodule and moderate to severe  
7 COPD. (Tr. 305.) Dr. Green recommended chest imaging of the  
8 nodule, additional antibiotics, flonase for sinusitis, and  
9 albuterol for breathing as needed. (Tr. 305.) The only  
10 additional record from Dr. Green is a letter dated August 28,  
11 2006, opining that plaintiff's COPD causes at least a moderately  
12 severe impairment and he is capable of sedentary work. (Tr. 319.)

13 The ALJ opined:

14 Although Dr. Green is a specialist in pulmonary  
15 diseases, his one-time examination of the claimant  
16 could not have provided him with a detailed,  
17 longitudinal picture of the claimant's impairments.  
18 Physical examinations have demonstrated that the  
19 claimant has mildly diminished breath sounds and mild  
20 interstitial prominence. Although he has been  
21 diagnosed with moderately severe pulmonary disease,  
22 medical records indicate that his condition has  
23 responded to medication and that he has experienced only  
24 two exacerbations of his [COPD] since his alleged  
25 onset date of disability. Based on the foregoing  
26 the undersigned has rejected the limitations indicated  
27 by Dr. Green.

28 (Tr. 26.)

Dr. Green's report indicates he reviewed the January 18, 2006  
chest x-ray and administered pulmonary tests. (Tr. 304.) Dr.  
Green's report does not indicate that he had any other records to  
review.

The ALJ rejected Dr. Green's opinion that plaintiff's COPD  
limits him to sedentary work because it is inconsistent with

1 objective medical evidence. (Tr. 26.) The ALJ is correct.  
2 Examples include the opinion of treating physician Nathan Stime,  
3 M.D., in 2000 that plaintiff could perform light work (Tr. 261);  
4 the notation of examining physician Edgar Figueroa, M.D., in May  
5 of 2002 that plaintiff said he had untreated emphysema and had not  
6 seen a physician in over a year. Dr Figueroa opined emphysema  
7 "does not appear to be severe at this time" (Tr. 264-265); records  
8 of examining physician Robert Rose, M.D., in October of 2004 that  
9 plaintiff has used inhalers in the past but not currently. Dr  
10 Rose assessed COPD symptoms with mild to moderate exertion. (Tr.  
11 291, 293.) An ER record from January 19, 2006 indicates difficulty  
12 breathing; plaintiff had been seen the previous day and diagnosed  
13 with asthmatic bronchitis but did not fill the prescriptions given  
14 because he said he could not afford it. After being given three  
15 nebulized treatments in the hospital, plaintiff felt significantly  
16 improved. (Tr. 317.) Art Flores, PAC, noted on July 31, 2006,  
17 plaintiff's only current medication is zyrtec for allergies. (Tr.  
18 329.) Mr. Flores notes that after being out of medication for one  
19 week in October of 2006, plaintiff experienced shortness of  
20 breath, wheezing and coughing, while on his medication he was  
21 doing well. (Tr. 343.) The reasons stated by the ALJ for  
22 discrediting Dr. Green's opinion are legitimate, specific, and  
23 supported by substantial evidence in the record. See *Lester v.*  
24 *Chater*, 81 F. 3d 821, 830-831 (9<sup>th</sup> Cir. 1995)(holding that the ALJ  
25 must make findings setting forth specific, legitimate reasons for  
26 rejecting the treating physician's contradicted opinion).

27 To further aid in weighing the conflicting medical evidence,  
28 the ALJ evaluated plaintiff's credibility and found him less than

1 fully credible. (Tr. 25-26.) Credibility determinations bear on  
2 evaluations of medical evidence when an ALJ is presented with  
3 conflicting medical opinions or inconsistency between a claimant's  
4 subjective complaints and diagnosed condition. *See Webb v.*  
5 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

6 It is the province of the ALJ to make credibility  
7 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
8 1995). However, the ALJ's findings must be supported by specific  
9 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
10 Cir. 1990). Once the claimant produces medical evidence of an  
11 underlying medical impairment, the ALJ may not discredit testimony  
12 as to the severity of an impairment because it is unsupported by  
13 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
14 1998). Absent affirmative evidence of malingering, the ALJ's  
15 reasons for rejecting the claimant's testimony must be "clear and  
16 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
17 "General findings are insufficient: rather the ALJ must identify  
18 what testimony not credible and what evidence undermines the  
19 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
20 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

21 The ALJ relied on several factors when he assessed  
22 credibility (an assessment unchallenged on appeal): plaintiff's  
23 failure to follow recommended treatment and minimal treatment  
24 efforts, his daily activities, and the objective medical evidence.  
25 (Tr. 25.) Plaintiff's inconsistent treatment efforts have been  
26 discussed. The ALJ points out plaintiff's daily activities in  
27 October of 2004 (a month prior to onset) included driving,  
28 shopping and cooking. (Tr. 25, citing Exhibit 8F/1.) In July of

1 2006, the ALJ observes plaintiff said he walked daily for  
2 exercise. At the hearing plaintiff testified he does his own  
3 laundry and shops. (Tr. 25.) Some of the objective medical  
4 evidence has been discussed. The ALJ notes that with respect to  
5 plaintiff's back complaints, an examining physician opined that  
6 "the claimant's pain complaints appeared to be out of proportion  
7 to the physical findings." (Tr. 25, referring to Exhibit 4F/4.)

8 The ALJ's reasons for finding plaintiff less than fully  
9 credible are clear, convincing, and fully supported by the record.  
10 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
11 2002)(proper factors include inconsistencies in plaintiff's  
12 statements, inconsistencies between statements and conduct, and  
13 extent of daily activities). Noncompliance with medical care or  
14 unexplained or inadequately explained reasons for failing to seek  
15 medical treatment also cast doubt on a claimant's subjective  
16 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
17 2d 597, 603 (9<sup>th</sup> Cir. 1989).

18 The ALJ properly discounted Dr. Green's opinion based on his  
19 status as a one-time examining physician, his apparent lack of  
20 longitudinal records, and other medical records. These are  
21 specific legitimate reasons supported by substantial evidence for  
22 the weight given to Dr. Green's opinion.

23 The ALJ is responsible for reviewing the evidence and  
24 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
25 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
26 trier of fact, not this court, to resolve conflicts in evidence.  
27 *Richardson*, 402 U.S. at 400. The court has a limited role in  
28 determining whether the ALJ's decision is supported by substantial

1 evidence and may not substitute its own judgment for that of the  
2 ALJ, even if it might justifiably have reached a different result  
3 upon de novo review. 42 U.S.C. § 405 (g).

4 The ALJ provided clear and convincing reasons supported by  
5 the record for finding plaintiff's allegations not fully credible.  
6 The ALJ weighed the medical evidence and failed to adopt some of  
7 the opinions of Dr. Green. Instead, the ALJ relied on the  
8 opinions of other examining and consulting physicians and on his  
9 assessment of plaintiff's credibility. The ALJ gave specific and  
10 legitimate reasons, supported by substantial evidence, for  
11 rejecting some of the assessed limitations. The ALJ's assessment  
12 of the medical and other evidence is supported by the record and  
13 free of legal error.

#### 14 CONCLUSION

15 Having reviewed the record and the ALJ's conclusions, this  
16 court finds that the ALJ's decision is free of legal error and  
17 supported by substantial evidence..

#### 18 IT IS ORDERED:

19 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
20 **GRANTED.**

21 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
22 **DENIED.**

23 The District Court Executive is directed to file this Order,  
24 provide copies to counsel for Plaintiff and Defendant, enter  
25 judgment in favor of Defendant, and **CLOSE** this file.

26 DATED this 16th day of December, 2008.

27 s/ James P. Hutton

JAMES P. HUTTON

28 UNITED STATES MAGISTRATE JUDGE